HON. THOMAS S. ZILLY
Noted: February 15, 2019
WITHOUT ORAL ARGUMENT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

BRENDA TAYLOR, individually, and as executor of the Estate of Che Andre Taylor; JOYCE TAYLOR, individually; CHE ANDRE TAYLOR, JR., individually; and SARAH SETTLES on behalf of her minor child, CMT,

Plaintiffs,

vs.

CITY OF SEATTLE; MICHAEL SPAULDING and "JANE DOE" SPAULDING, and their marital community composed thereof; SCOTT MILLER and "JANE DOE" MILLER, and their marital community composed thereof; TIMOTHY BARNES and "JANE DOE" BARNES, and their marital community composed thereof; and AUDI ACUESTA and "JANE DOE" ACUESTA, and their marital community composed thereof,

Defendants.

No. 2:18-CV-00262

DEFENDANTS' PARTIAL MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT UNDER 12(b)(6)

Noted: February 15, 2019

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Defendants City of Seattle, Michael Spaulding, Scott Miller, Timothy Barnes, and Audi Acuesta ("Defendants" respectfully request this Court to partially dismiss Plaintiffs' Second Amended Complaint under Fed. R. Civ. P. 12(b)(6).[1] In support thereof, Defendants state the following:

INTRODUCTION

Plaintiffs' Second Amended Complaint still fails to appropriately state actionable claims against Defendants. Plaintiffs' negligence allegations fail as a matter of law and should be dismissed with prejudice. Likewise, Plaintiffs' *Monell* allegations fail to state a claim – a deficiency that cannot be cured by amendment. Plaintiffs continues to have insufficient allegations against Officers Acuesta and Barnes to state plausible causes of action against them. These officers should be dismissed with prejudice. Plaintiff continues to plead improper claims that this Court previously dismissed with prejudice. Plaintiffs Second Amended Complaint is still rife with deficient pleadings. For the reasons stated herein, this Court should grant the Defendants' Motion.

FACTS

1. Allegations in the Second Amended Complaint.

The facts, as alleged in Plaintiffs' First Amended Complaint are as follows: On February 21, 2016 Che Andre Taylor, an African American male, was standing in the doorframe of a white motor vehicle talking to people inside the vehicle. (Dkt. 28, ¶¶ 4.1, 4.3). Officers Michael Spaulding and Scott Miller were observing Che Andre Taylor in an undercover capacity from an undercover vehicle prior to the shooting. (*Id.* at ¶ 4.4). Based upon their perceived observations, Officers Spaulding and

[1] For the sake of expediting resolution of some issues, counsel for Defendants attempted to confer and coordinate with counsel for Plaintiffs on the Defendants' objections to the proposed Second Amended Complaint prior to its filing. A copy of those communications is attached to the Declaration of Ghazal Sharifi as Exhibit A.

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Miller chose to approach and attempt to arrest Che Andre Taylor with long rifles because of the stopping power of these particular firearms. (*Id.*at ¶¶ 4.5-4.6). Officers Spaulding and Miller were wearing black tactical jackets at the time that they chose to approach and attempt to arrest Che Andre Taylor. (*Id.* at ¶ 4.7). At the time that Officers Spaulding and Miller began to approach Che Andre Taylor, a marked Seattle Police vehicle began to approach the scene, carrying Officers Barnes and Acuesta. (*Id.* at ¶ 4.8-4.10).

In the video, Officers Spaulding and Miller can be seen quickly approaching the vehicle that Che Andre Taylor was standing in with their guns drawn. (*Id.* at ¶ 4.11). In the audio recording, multiple police officers can be heard simultaneously giving Che Andre Taylor, including Officer Barnes, Acuesta, Spaulding and Miller. The commands given to Che Andre Taylor were not consistent. (*Id.* at ¶ 4.12). Some of these police officers can be heard yelling at Che Andre Taylor to put his hands up while other police officers can be heard yelling at Che Andre Taylor to get on the ground, the commands given by the officers -Offices Spaulding, Miller, Barnes and Acuesta- were inconsistent and incompatible commands that conflicted with the other commands given by the other officers present, which created a chaotic and disorganized environment for the Che Andre Taylor by these officers. (*Id.*at ¶ 4.13). These officers were shouting and ordering the decedent conflicting orders which was confusing the decedent. (*Id.*). The officers' voices were captured in the audio and video of the incident as these officers' were present and involved in creating this disorganized and dangerous situation. The officers, as trained policer officers by the City of Seattle, have a duty that they owe to all citizens, including Che Andre Taylor not to create a chaotic scene in which conflicting orders are given, confusing the decedent, and eventually leading to him being shot multiple times and dying. All officers own a duty to civilians, including Che Andre Taylor to serve and protect them and to give orderly commands that can and should be followed, not commands that

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hat would endanger the public in general. When the officers gave their instructions and gave verbal commands to the decedent, which were conflicting and confusing orders, they breached their duty to him and thereby created a dangerous situation that led to Che Andre Taylor being shot and killed. (*Id.*). The police officer commands to Che Andre Taylor were being yelled at Che Andre Taylor from different directions with multiple differing commands. Plaintiffs believe it was the City of Seattle's custom and practice that trained and reinforced the officers- Officer Spaulding, Miller, Barnes, and Acuesta – to given conflicting and contrary commands to a Che Andre Taylor, which led to him being shot multiple times and ultimately dying. (*Id.* at ¶ 4.14). Che Andre Taylor can be seen on the video attempting to comply with the simultaneous and conflicting and opposing commands of the police officers. (*Id.* at ¶ 4.15). Che Andre Taylor first puts his hands in the air and then attempts to drop to the ground as instructed by the police officers. (*Id.* at ¶ 4.16). Che Andre Taylor was shot by Officers Spaulding and Miller within seconds of their approach of Che Andre Taylor. (*Id.* at ¶ 4.17).

After shooting Che Andre Taylor, police officers rolled his body over and handcuffed him. (*Id.* at ¶ 4.18). Critical minutes lapsed between the time in which Che Andre Taylor was shot and the time that police officers allowed medical emergency personnel to render aid. (*Id.* at ¶ 4.19). Shortly after Che Andre Taylor was shot, Seattle Police Officers began to turn their attention to the other individuals in the vehicle that Che Andre Taylor had been standing by and commanded the remaining individuals in the car to get out of it. (*Id.* at ¶ 4.20-4.21). The passenger in the back seat of the vehicle (a white female) that Che Andre Taylor was standing by and had difficulty following the command given by the police officers. First, the police officer instructed her to exit the vehicle out of the back door that is on the driver side. Rather than going to the driver side back door, she lunged toward the passenger side door. The backseat passenger also failed to comply with the officer

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commands when she initially got out of the vehicle. Police officers did not shoot her. (*Id.* at ¶ 4.22). The driver of the white vehicle was a white male. Police officers paid little to no attention to his actions or movements at the time that they approached Che Andre Taylor. (*Id.* at 4.23). Che Andre Taylor was ultimately shot and killed while attempting to comply with conflicting police officers' commands. (*Id.* at ¶ 4.24). Che Andre Taylor was denied the ability to comply with the police officers' commands as they were inconsistent to him. (*Id.* at ¶ 4.25). As a result of the actions of the police officers in this incident, Che Andre Taylor was denied due process of law. (*Id.* at ¶ 4.26).

Plaintiffs further allege that the civil rights violations were proximately caused by the City's customs, policies and usages. Plaintiffs allege: The City is liable for intentional torts or negligence under goes further than [sic] the theory of *respondent superior* if the employee was acting in the scope and course of employment. The City of Seattle's customs and officers giving conflicting commands, decedent attempting to comply with the conflicting commands by putting his hands up in the air and then attempting to drop them to the ground, officers shooting decedent thereafter within seconds after approaching decedent meets the *Monell* claims as policy or custom of giving conflicting commands and shooting and killing an individual within seconds is deficient, it caused great harm to the Plaintiffs, and it could be viewed that the policy/custom amounted to deliberate indifference. Whether the City had proper training, procedure, and policies in place for its officers on how to handle similar situations prior to resorting to shooting and killing citizens, as Che Andre Taylor, will be proven after discovery is concluded and at trial. (*Id.* at ¶ 2.4).

2. Reference to "the Video."

Plaintiffs continue to reference "the video" in their pleadings but fail to attach the same. (*See* Dkt 28, ¶¶ 4.11-4.13, 4.15). A publicly available version of the at issue portions of the referenced video is available at: https://www.youtube.com/watch?v=_6K49zBT-n4 (last accessed, January 15,

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2019). The City is also filing a full version of "the video" as Exhibit B to the declaration of Ghazal Sharifi.

Though the Court typically does not look beyond the text of the complaint to decide a motion to dismiss, a court may take judicial notice of facts that are not subject to reasonable dispute because they are (1) generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). The Court may also take judicial notice of matters of public record. *Cycle Barn, Inc. v. Arctic Cat Sales, Inc.*, 701 F. Supp. 2d 1197, 1201-02 (W.D. Wash. 2010). A court may consider information outside of the complaint when applying the "incorporation by reference" doctrine. This allows the court to consider documents referenced in the complaint and consider those documents without converting the motion to a summary judgment. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002). "We have said that a document is not 'outside' the complaint if the complaint specifically refers to the document and if its authenticity is not questioned." *Townsend v. Columbia Operations*, 667 F.2d 844, 848–49 (9th Cir. 1982). In the Ninth Circuit, documents where the contents are referenced or otherwise alleged in a complaint but are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss if the authenticity is not challenged. Such consideration does "not convert the motion to dismiss into a motion for summary judgment." *Romani*, 929 F.2d at 879 n. 3; *see also Branch v. Tunnell*, 14 F.3d 449, 453–54 (9th Cir. 1994) *overruled on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). Defendants respectfully request that this Court consider these materials as part of this Motion to Dismiss under the incorporation by reference doctrine.

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ARGUMENT

A complaint challenged by a Rule 12(b)(6) motion to dismiss need not provide detailed factual allegations, but it must offer "more than labels and conclusions" and contain more than a "formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The complaint must indicate more than mere speculation of a right to relief. *Id.* "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 500 U.S. at 570). A complaint lacks "facial plausibility" if it merely "tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). When a complaint fails to adequately state a claim, such deficiency should be "exposed at the point of minimum expenditure of time and money by the parties and the court." *Twombly*, 500 U.S. at 558. The Supreme Court established a two-prong analysis for sufficiency of a complaint under Fed. R. Civ. P. 8(a)(2) in *Iqbal*, 556 U.S. at 678-79. The Court first determines which allegations are to receive a presumption of truth, noting that legal conclusions are not presumed to be true. *Id.* Then, the Court determines whether the factual allegations, presumed to be true, give rise to a "plausible" claim for relief. *Id.* If the Court dismisses the complaint or portions thereof, it must consider whether to grant leave to amend. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000).

I. PLAINTIFFS FAIL TO STATE A CLAIM FOR NEGLIGENCE.

This Court in its Order dated October 16, 2018 dismissed without prejudice Plaintiffs' First and Fifth Causes of Action based in negligence because they failed to allege essential elements of a negligence claim. (Court's Order at 4). In their Second Amended Complaint for Damages, Plaintiffs resurrect negligence claims against the City and Officers Barnes, Acuesta, Miller and Spaulding. They allege the officers and had a duty "that they owe to all citizens, including Che Andre Taylor

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not to create a chaotic scene in which conflicting orders are given." (Dkt. 29, ¶ 4.14). They allege the Officers breached their duties when they 1) gave inconsistent commands and 2) when they "chose to shoot and kill Che Taylor." (Dkt. 29, ¶ 5.1).

First, these allegations on their face do not support a claim for liability and this Court should dismiss Plaintiffs' negligence claims with prejudice. The imposition of liability based on a breach of duty alleged to be owed to all citizens as Plaintiffs' claims is contrary to the public duty doctrine. Second, Plaintiffs' allegation that Officers chose to shoot Mr. Taylor cannot be supported in law as anything other than an intentional act for which common law negligence does not apply.

1. No Negligence Claim for Intentional Act.

It is well established in Washington that a plaintiff may not base a claim of negligence on an intentional act. *See Willard v. City of* Everett, 2013 WL 4759064 at *2-*3 (W.D. Wash. Sept. 4, 2013). Choosing to shoot Mr. Taylor cannot be anything other than intentional and cannot be transformed to expose defendants to potential liability arising from negligence. *Ste. Michelle v.* Robinson, 52 Wn. Ap. 309, 314-16, 759 P.2d 467 (1988).

2. Public Duty Doctrine Bars Claim.

Plaintiffs allege that "[a]ll officers own [sic] a duty to civilians, including Che Andre Taylor to serve and protect them and to give orderly commands that can and should be followed, not commands that hat [sic] would endanger the public in general." ¶4.13 (emphasis added). Regardless of whether a defendant is a government entity, police officer, or private individual, a negligence claim is only actionable if the duty is owed to the injured plaintiff and not to the public in general. *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 784-85, 30 P.3d 1261, 1267 (2001). Washington law expresses this concept through the "public duty doctrine." *Id.* at 785. "Under the public duty doctrine, no liability may be imposed for a public official's negligent conduct unless it

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is shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general." *Id.* Here, Plaintiffs describe this duty as owed to all civilians. ¶4.13. This is exactly the type of duty barred by the public duty doctrine. Stated another way, absent a showing of a duty running to the injured plaintiff from municipal agents, no liability may be imposed for a municipality's failure to provide protection or services to a particular individual. *Bailey v. Town Forks,* 108 Wn.2d 262, 265, 737 P.2d 1257 (1987). Courts have found that the public duty doctrine bars tort liability for officers' use of force during an arrest. "[W]hile it is true that the officers owe a general duty to all citizens of the City to avoid the use of excessive force when effectuating an arrest, it cannot be said that they owe [the plaintiff] a specific duty." *James v. City of Seattle,* 2011 WL 6150567, 15 (W.D. Wash. 2011) (unpublished) (citing *Pearson v. Davis,* No. C06-5444RBL, 2007 WL 3051250 at *4 (W.D. Wash. 2007); *see also Jimenez v. City of Olympia,* No. C09-5363RJB, 2010 WL 3061799, at *15 (W.D. Wash. 2010). ("It appears that the public duty doctrine bars a claim [for negligence arising out of the use of excessive force] against [the] [o]fficers… and the City…."); *Nix v. Bauer, No. C051329Z, 2007 WL 686506, at *4 (W.D. Wash. 2007)* citing *Donaldson v. City of Seattle,* 65 Wn. App. 6612, 831 P.2d 1098 (1992).

Four exceptions exist to the public duty doctrine, under which governmental agencies may acquire a special duty of care owed to a plaintiff or a limited class of potential Plaintiffs: (1) legislative intent, (2) failure to enforce, (3) the rescue doctrine, and (4) a special relationship. *Id.* T 785-86. As set forth below, none of these exceptions could apply here.

A. The Legislative Intent Exception Does Not Apply.

The legislative intent exception to the public duty doctrine applies when a statute or regulation establishes a governmental duty and expressly identifies and protects a particular and defined class of persons. *Ravenscroft v. Wash. Water Power Co.,* 136 Wn.2d. 911, 930, 969 P.2d 75

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(1998). To ascertain the legislative intent, courts look to the statue's declaration of purpose. *Donohoe v. State*, 135 Wn. App. 824, 844, 142 P.2d 654 (2006). "This legislative intent must be clearly expressed, not implied." *Id.* In this case, plaintiffs' complaint fails to reference any statute or legislation which could be construed as an exception to the public duty doctrine. Therefore, this exception does not apply.

B. The Failure to Enforce Exception Does Not Apply.

The failure to enforce exception to the public duty doctrine applies when "(1) governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, (2) these agents fail to take corrective action despite a statutory duty to do so, and (3) the plaintiff is within the class of person the statute intended to protect." *Vergeson v. Kitsap County*, 145 Wn. App. 526, 538, 186 P.3d. 1140 (2008). Again, no statutory duty exists with respect to the City or Officers and Mr. Taylor. The failure to enforce exception does not apply in this case.

C. The Rescue Doctrine Exception Does not Apply.

The rescue exception to the public duty doctrine applies when a governmental entity or its agents "(1) undertakes a duty to aid or warn a person in danger; (2) fails to exercise reasonable care; and (3) offers to render aid and, as a result of the offer of aid, either the person to whom the aid is to be rendered, or another acting on that person's behalf, relies on this governmental offer and consequently refrains from acting on the victim's behalf." *Vergeson*, 145 Wn. App. at 539. Here, Officers Spaulding and Miller were in the process of arresting Mr. Taylor. The rescue doctrine exception does not apply in this case.

D. The Special Relationship Exception Does Not Apply.

Under the special relationship exception, a governmental entity is liable for negligence where there is (1) direct contact or privity between the public official and injured plaintiff, (2) express

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assurance given by the public official to the injured plaintiff, and (3) justifiable reliance by the plaintiff on such express governmental assurance. *Vergeson*, 145 Wn. App. at 539; *Chambers-Castanes v. King County*, 100 Wn.2d 275, 285-86, 669 P.2d 451 (1983). Here, none of the officers had any contractual or statutorily based relationship with Mr. Taylor. No privity existed. No express assurances were made with respect to his safety.

E. Public Duty Doctrine Bars Duties Allegedly Owed to All.

No exception to the public duty doctrine applies and therefore the City and its officers cannot be held liable in negligence for the intentional shooting of Mr. Taylor where the only allegation of negligence is that the Officers gave inconsistent commands which Plaintiffs allege is a duty officers owe to all civilians.

3. Even if this Court Finds a Duty, there is No Negligence on the Part of Officers Acuesta and Barnes Because the Intentional Shooting Served as an Intervening Superseding Cause.

To be liable in negligence, Plaintiffs must establish duty, breach, proximate causation, and damages. *Ranger Ins. Co. v. Pierce County*, 1164 Wn2d. 545, 552, 192 P.3d 886 (2008). However, if a defendant's acts were superseded by the action of the plaintiff or a third party as a matter of law, summary judgment may be granted in favor of the defendant. *Kim v. Budget Rent A Car Systems, Inc.*, 143 Wash. 2d 190, 15 P.3d 1283 (2001), as amended, (Jan. 31, 2001). "A defendant's negligence is a proximate cause of the plaintiff's injury only if such negligence, unbroken by any new independent cause produces the injury complained of." *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 482, 951 P.2d 749, 756 (1998) (citing *Maltman v, Sauer,* 84 Wash.2d 975, 982, 530 P.2d 254 (1975)). A superseding cause is a new independent cause that breaks the chain of proximate causation between a defendant's negligence and an injury. *Schooley,* 134 Wn.2d at 756 (citing *State v. McAllister,* 60 Wn.App. 654, 660, 806 P.2d 772 (1991)).

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Plaintiffs allege that all officers were shouting "conflicting orders" to the decedent. If the Court deems this enough to establish a duty to the Plaintiffs, the Plaintiffs still fail to establish proximate cause against Officers Acuesta and Barnes. The intentional shooting of the decedent by Officers Spaulding and Miller served as a superseding, intervening cause breaking the causal chain alleged by Plaintiffs as they pertain to Officers Acuesta and Barnes. Plaintiffs' own pleading supports the Defendants' argument that the intentional shooting served as an intervening, superseding cause – and was not a foreseeable result of giving "conflicting orders." Plaintiffs allege, "[t]he backseat passenger also failed to comply with the officer commands when she initially got out of the vehicle. Police officers did not shoot her." (Dkt. 29, ¶ 4.22). Plaintiffs fail to plead a causal connection between the "conflicting orders" of Officers Acuesta and Barnes and the damages incurred from the intentional shooting of the decedent. This Court should dismiss Plaintiffs' negligence claim with prejudice.

II. PLAINTIFFS FAIL TO ALLEGE ANY § 1983 CLAIMS AGAINST THE CITY OF SEATTLE.

Plaintiffs' Second Amended Complaint did not cure the deficiencies from their Amended Complaint and still fails to state a *Monell* claim. First, a *Monell* claim is not identified anywhere in Plaintiffs' "causes of action." *See* (Dkt. 29). Second, to the extent Plaintiffs are attempting to allege a *Monell* claim, Plaintiffs still fail and seem to imply a veiled *respondeat* claim. As noted in the City's prior briefing, it is well settled that "[s]ection 1983 suits against local governments alleging constitutional rights violations by government officials cannot rely solely on respondeat superior liability." *AE ex rel. Hernandez v. Cty. of Tulare,* 666 F.3d 631, 636 (9th Cir. 2012) (citing *Whitaker v. Garcetti,* 486 F.3d 572, 581 (9th Cir.2007) and *Monell v. Dept. of Social Svcs. of N.Y.,* 436 U.S. at 658, 691 (1978). To attach liability to a municipality under 42 U.S.C. § 1983, "[t]here must be a

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"deliberate policy, custom, or practice that was the moving force behind the constitutional violation [plaintiff] suffered." *Whitaker*, 486 F.3d at 581. "The action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell*, 436 U.S. at 690.

To withstand Rule 12(b)(6), *Monell* allegations may be considered sufficient where they: "(1) identify [a] challenged policy/custom; (2) explain how the policy/custom is deficient; (3) explain how the policy/custom caused the plaintiff harm; and (4) reflect how the policy/custom amounted to deliberate indifference, i.e. show how the deficiency involved was obvious and the constitutional injury was likely to occur." *McFarland v. City of Clovis*, No. 1:15-CV-1530 AWI SMS, 2016 WL 632663, at *2 (E.D. Cal. Feb. 17, 2016) (citing *Young v. City of Visalia*, 687 F. Supp. 2d 1141, 1149-50 (E.D. Cal. 2009)).

Plaintiffs allege:

> The City of Seattle's customs and officers giving conflicting commands, decedent attempting to comply with the conflicting commands by putting his hands up in the air and then attempting to drop them to the ground, officers shooting decedent thereafter within seconds after approaching decedent meets the Monell claims as policy or custom of giving conflicting commands and shooting and killing an individual within seconds is deficient, it caused great harm to the Plaintiffs, and it could be viewed that the policy/custom amounted to deliberate indifference. Whether the City had proper training, procedure, and policies in place for its officers on how to handle similar situations prior to resorting to shooting and killing citizens, as Che Andre Taylor, will be proven after discovery is concluded and at trial.

(Dkt. 28, ¶ 2.4). This pleading is still insufficient to properly allege a *Monell* claim. First, giving conflicting commands is not an unconstitutional act. Second, assuming *arguendo* that Plaintiffs properly allege an unconstitutional act, the Plaintiffs still fail to plead a proper *Monell* claim. In *Davis v. City of Ellensburg*, 869 F.2d 1230, 1233 (9th Cir. 1989), the Ninth Circuit identified that

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"[a] plaintiff cannot prove the existence of a municipal policy or custom based solely on the occurrence of a single incident of unconstitutional action by a non-policymaking employee." Further, the Ninth Circuit holds that "[e]vidence of mistakes by adequately trained personnel or the occurrence of a single incident of unconstitutional action by a non-policy-making employee is not sufficient to show the existence of an unconstitutional custom or policy." *Latham v. Bauer*, No. 315CV05241RJBJRC, 2015 WL 7575079, at *3 (W.D. Wash. Oct. 27, 2015), *report and recommendation adopted*, No. 15-CV-05241 RJB, 201 WL 7588292 (W.D. Wash. Nov. 25, 2015) (citing *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1444 (9th Cir.1989)).

Here, Plaintiffs' single *Monell* allegation is a broader summary of their allegations from the underlying incident. *See* (Dkt. 28, ¶ 2.4). Plaintiffs admit in the pleadings that they do not know and fail to state what policies, training, or procedures they are alleging is deficient. (*Id.* noting, "[w]hether the City had proper training, procedure, and policies in place for its officers on how to handle similar situations prior to resorting to shooting and killing citizens, as Che Andre Taylor, will be proven after discovery is concluded and at trial."). This is insufficient to meet the threshold pleading requirements of this Circuit. *See Cooper v. Cty. of Los Angeles*, 26 F. App'x 698, 699 (9th Cir. 2002); *Kayser v. Whatcom Cty.*, No. C18-1492-JCC, 2018 WL 6304756, at *3 (W.D. Wash. Dec. 3, 2018) ("Plaintiffs' allegations concerning Defendant prosecutors' failure to disclose *Brady* material in this case, coupled with the conclusory allegation that such failure is attributable to a policy implemented by Defendant Whatcom County or lack thereof, is insufficient to establish a plausible claim that Defendant Whatcom County is liable under *Monell*."); *Dilworth v. City of Everett*, No. C14-1434 MJP, 2014 WL 6471780, at *4 (W.D. Wash. Nov. 17, 2014).

More importantly, Plaintiffs' pleading is deficient because it fails to put the City on notice of *what* the Plaintiffs are challenging – and Plaintiffs admit to also being unsure of the same.

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Plaintiffs' admission in their Second Amended Complaint that the challenged policies, training, practices "will be proven after discovery is concluded and at trial" reveals that Plaintiffs cannot cure their pleading deficiencies with further amendment because they do not have a *Monell* claim against the City. This Court should dismiss any attempted *Monell* claim against the City with prejudice.

III. PLAINTIFFS STILL FAIL TO STATE A CLAIM AGAINST OFFICERS AUDI ACUESTA AND TIMOTHY BARNES.

Plaintiffs' allegations against Offices Acuesta and Barnes remain largely the same. Plaintiff alleges that Officers and Barnes joined in the shouting of conflicting commands. However, Plaintiffs still fail to identify how this gives rise to any cause of action. For the reasons stated in Section I, *supra,* Plaintiffs do not have a negligence action against Officers Acuesta and Barnes because Plaintiffs' negligence claim fails as a matter of law. Plaintiffs still fail to allege enough facts that give rise to any cause of action against Officers Acuesta and Barnes. Officers Acuesta and Barnes were not present upon Officer Spaulding and Miller's initial approach to Taylor. (Dkt. 28 at ¶¶ 4.7-4.8; Sharifi Dec., Ex. B) Officers Acuesta and Barnes did not seize or arrest Taylor. (*Id.* at ¶¶ 4.5, 4.7; Sharifi Dec., Ex. B). Officers Acuesta and Barnes did not shoot Mr. Taylor. (*Id.* at ¶ 4.17; Sharifi Dec., Ex, B). If fact, "the video" reveals that Mr. Taylor did not look toward, heed, or acknowledge Officers Acuesta and Barnes. *See Scott v. Harris*, 550 U.S. 372, 380-81 (2007). (Sharifi Dec., Ex. B). None of Plaintiffs' causes of action can extend to any alleged actions of Officers Acuesta and Barnes. This Court should dismiss Officers Acuesta and Barnes with prejudice.

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IV. CLAIMS OF USE OF FORCE SHOULD BE ANALYZED SOLELY THROUGH THE LENS OF THE FOURTH AMENDMENT.

Plaintiffs again allege a single paragraph in their Amended Complaint stating, "[a]s a result of the actions of the police officers in this incident . . . [Taylor] was denied due process of law. (Dkt. 6, ¶ 4.26). The Supreme Court unequivocally held,

> *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.

Graham v. Connor, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871 (1989) (emphasis in original). This Court should reject any substantive due process claim on behalf of Taylor to the extent Plaintiffs' Second Amended Complaint attempts to assert a substantive due process claim for the use of force in this case.

V. PLAINTIFFS FAIL TO FOLLOW THE COURT'S PRIOR ORDER REGARDING THE DEFICIENCIES IN THEIR PLEADINGS FOR THEIR FOURTH AMENDMENT ALLEGATIONS.

In its October 17, 2018 Order, this Court noted, "[t]o the extent Plaintiffs other than Brenda Taylor are pursuing Fourth Amendment causes of action (e.g., Compl. ¶5.11), those causes of action are dismissed with prejudice." (Dkt. 26, p. 10, lines 16-18). Plaintiffs' Second Amended Complaint again pleads these claims on behalf of "all plaintiffs" and fails to cure the deficiencies from their Amended Complaint consistent with the Court's Order. (*See* Dkt. 28 ¶¶ 5.3, 5.4). This Court should again dismiss Plaintiffs' Fourth Amendment causes of action (other than Brenda Taylor) with prejudice.

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VI. BRENDA TAYLOR'S SUBSTANTIVE DUE PROCESS CLAIMS UNDER § 1983 SHOULD BE DISMISSED.

In its October 17, 2018 Order, this Court stated, "Plaintiffs concede that Brenda Taylor's substantive due process cause of action should be dismissed . . . The Court will dismiss Plaintiffs' seventh cause of action . . . with prejudice." (Dkt. 26, p. 11, lines 16-18). Plaintiffs repleaded this claim in their Second Amended Complaint. (Dkt. 28, ¶ 5.6). This Court should again dismiss with prejudice.

CONCLUSION

Plaintiffs' Second Amended Complaint still fails to state a claim on many alleged claims. This Court should grant the Defendants' Motion, dismiss the deficient claims with prejudice, and deny Plaintiffs any further amendment to cure their twice-deficient pleadings and for any other relief this Court deems just and proper.

DATED this 15th day of January, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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